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Supreme Court, U.S.
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No. 97-643

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

VICKIE S. CABRALES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether venue in a prosecution for money laundering under 18 U.S.C. §§ 1956 and 1957 is proper in the district where the illicit funds were generated, when the defendant's unlawful financial transactions occurred in another district?

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, nonprofit voluntary association of criminal defense lawyers founded in 1958. NACDL is affiliated with 68 state and local criminal defense organizations and works cooperatively with them on issues related to criminal justice. NACDL speaks for more than 28,000 criminal defense lawyers nationwide.

NACDL seeks to promote the fair administration of criminal justice through adherence to the Bill of Rights. It also seeks to improve the quality of the American System of criminal justice and to educate bench, bar and public about it.

The primary concern of *amicus* in this case is the expanded potential for governmental forum shopping. If the Government's position is upheld, it would be an unprecedented and unwarranted expansion of the Government's power to choose the place of trial. A decision in favor of the Government would seriously impair the ability of defendants in future money laundering cases and perhaps in other complex crimes to receive a fair trial. Under the Government's theory, future defendants in such cases will be wrenched from the communities in which the crime was allegedly committed to distant

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[1] *Amicus* has filed letters from Petitioner and Respondent consenting to its submission of this brief on behalf of Respondent. In compliance with Rule 37.6, no person other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Further, the brief was not written in whole or in part by a counsel for a party.

venues because a stranger, not a party to the case, may have committed other crimes not charged in the indictment. Being forced to stand trial while separated from family and friends, removed form employment or place of business, and often deprived of representation by the defendant's trusted counsel is potentially devastating to the ability to mount an effective defense.

The brief of *amicus* does not address every point argued by the parties. They have briefed the issues well and fully parsed the relevant case law. Duplication of these arguments will not benefit the Court's decisional process. *Amicus* therefore limits its presentation to two points which may assist the Court in deciding this case: (1) that the historical context for the venue privilege counsels against expanding the traditional "crime committed test" and (2) that the Government's reliance on the law of conspiracy and complicity to lay venue based on the acts of others not charged in the indictment is wrong.

STATEMENT OF THE CASE

Amicus accepts Petitioner's statement of the case.

SUMMARY OF ARGUMENT

The Constitution requires that venue lie at the place where the crime is alleged to have been committed. U.S. CONST. Art. III, sec. 2, cl. 3. This provision of the Constitution was adopted even before the Bill of Rights as a protection against governmental oppression. The Framers

responded to the fierce opposition of the Colonists to Acts of Parliament that allowed the Crown to force a defendant to trial in a foreign land or another colony. The outrage at the English colonial practice was not merely symbolic; it was grounded in the practical hardships imposed when a defendant was dragged away from family, friends and work and, sometimes his counsel, to stand trial in a distant locale.

Petitioner now asks this Court for an unprecedented and unwarranted expansion of its power to choose the venue for a criminal trial, by basing venue on the crimes of a stranger to the case, not where the defendant's crime was committed. The core of Petitioner's argument is a strained analogy to principles of group culpability under the laws of conspiracy and complicity. Yet, the indictment does not allege that the defendant acted in Missouri, either personally or vicariously through others as accomplices or conspirators, with respect to the dismissed money laundering charges. This venue demand is unfaithful to the constitutional command that trial be held where the crime was "committed" and more in keeping with the spirit of the English colonial laws.

The position of *amicus* is that, absent allegations in the indictment of any culpable involvement in the underlying crimes generating the "dirty" funds, venue for violation of federal money laundering laws must be in the district where the financial transactions – here, one deposit and four withdrawals – allegedly occurred. Basing venue on the actions of non-parties, where there is no allegation that the defendant participated in the underlying unlawful act, confers upon the Government a

forum shopping power that contravenes the venue clause.

ARGUMENT

I. THE HISTORY OF THE VENUE CLAUSE COUNSELS AGAINST AN EXPANSIVE INTERPRETATION OF THE PLACE WHERE AN ALLEGED CRIME IS COMMITTED.

The Constitution requires that venue lie at the place where the crime is alleged to have been committed:

> The trial of all Crimes, except in the case of impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such a Place or places as Congress may by Law have directed.

U.S. Const. Art. III, sec. 2, cl. 3. This Court has ruled that venue concerns in criminal trials

> are matters that touch closely the fair administration of criminal justice and public confidence in it. . . . Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy. . . .

United States v. Johnson, 323 U.S. 273, 276 (1944).

These deep issues of public policy arise because the venue clause is a protection against the arbitrary exercise of government power exemplified by English colonial laws that allowed the removal of criminal trials to vice-

admiralty courts. The Stamp Acts and the Townshend Acts of the 1760's, for example, empowered the vice-admiralty courts to try such cases. Defendants in vice-admiralty courts did not enjoy the right to jury trials. As a result, criminal cases that would be triable by jury in a colony's courts were heard by a sole judge sitting at the pleasure of the British Crown. Bernard Bailyn, The Ideological Origins Of The American Revolution, 108-109 (Harvard University Press 1992) (1967). Adding insult to injury, venue in may cases was set in Halifax, Nova Scotia, where the colonial defendants faced severe evils: defending themselves in a land foreign to them and without their own counsel, losing their land by the required absence, and an almost certain conviction at the hands of a legal system tilted against them. *Id*. Additionally, the Administration of Justice Act of 1774, another of the "Intolerable Acts," included a provision that allowed venue in other colonies or England for prosecutions of felonies committed by public officials. Alfred H. Kelly And Winfred A. Harbison, The American Constitution, Its Origins And Development 76 (Norton 1976) (1948).

In reaction to the Intolerable Acts, Edmund Burke noted that English venue would present particular hardship to colonial defendants: "brought hither in the dungeon of a ship's hold . . . he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence." Albert W. Alschuler and Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 874 (1994) [quoting Edmund Burke, Letter To The Sheriffs Of

BRISTOL, THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 189, 192 (Little Brown, 9th ed. 1889)].

The Declaration of Independence also denounces these abuses: "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation . . . For transporting us beyond Seas to be tried for pretended offenses." The Declaration of Independence, para. 16 (1776).

A leading treatise on criminal procedure summarizes the historical rationale for venue where the crime was committed:

> The crime-committed formula offered several elements of convenience for the defense. Relevant evidence would most readily be accessible at the place where the incident constituting the alleged offense had occurred. Any witnesses to the incident were most likely to live in the vicinity and any relevant tangible evidence was most likely to be found there. Trial in a distant place would impose upon the defendant the often-serious hardship of arranging for the transportation of such witnesses and tangible evidence.

LAFAVE AND ISRAEL, CRIMINAL PROCEDURE 741 (West 2d ed. 1992). Further, note the authors, "the crime committed formula often facilitated use of jury of the vicinage. . . . " *Id.*

One critic has observed that the crime-committed test bears "no necessary connection to the location of the victim, witnesses, documents or other similar factors. It does not take account of the residence of the accused. . . . "

Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. L. Rev. 751 (1962). In other words, the goal of protecting a defendant's right to be tried close to home is not necessarily furthered by venue at the site of the alleged crime if it was committed away from home. This point was noted by the Court in *Travis v. United States*, 364 U.S. 631 (1961). The mobility of modern society enables criminals to travel and to use technology to commit crimes at distant locations.

The proper response to this point is two-fold. First, while there is no necessary connection in every case, it is certain that many crimes are in fact committed in the defendant's "backyard" so to speak; as to those, the historical reason for the venue privilege remains intact. The privilege should not be discarded or diminished by a tortured interpretation of the place that the crime is committed simply because in some cases it does not protect against distant trial. The harm to the defendant who is dragged off to stand trial in an alien venue can hardly be overstated. He will generally be removed from the support of his family and friends, cut off from employment, and deprived of the assistance of his customary counsel. Even if his regular counsel is free to leave his practice behind and travel to another district, the costs of defense must rise. Further, local rules may also require retaining local counsel, increasing costs even more. Even if this is not always true, it is true often enough to leave the constitutional command intact.

Second, if a crime is alleged to have occurred at a locale distant from residence, venue is at least connected to the place where the crime is allegedly committed. In a

meaningful sense, defendant has chosen that venue. Even if distant venue results from the acts of others, whether accomplices or coconspirators, defendant has at least "signed on" to their actions in furtherance of the common purpose. Venue that is distant from the place of residence but tied to the place where the crime was allegedly committed, based on complicity or conspiracy, derives from well-established principles of group culpability. But money laundering is not a group crime. It is not a conspiracy, nor does it require proof of aiding and abetting. Money laundering is a crime that can be committed by one person acting alone, under both §§ 1956 and 1957. Indeed, Respondent was named as the sole defendant in the three-count indictment in the district court.

II. THE ALLEGED MONEY LAUNDERING CRIMES WERE COMMITTED WHERE THE ALLEGED "FINANCIAL TRANSACTIONS" [SECTION 1956(a)(1)] AND THE ALLEGED "MONTARY TRANSACTIONS" [SECTION 1957(a)] OCCURRED – IN FLORIDA.

Petitioner argues that the fact that Respondent was not charged with the specified unlawful activity required as the source of funds by § 1956 "does not prevent the government from prosecuting her in the district where the drug trafficking occurred." Brief for Petitioner at p.14-15. Petitioner states that "in a variety of contexts this Court and the lower federal courts have recognized that an offense has been 'committed' in a particular district even though the defendant has not been shown to have personally performed any unlawful act, or indeed to have

been physically present, in the district where the prosecution is brought." Brief for Petitioner at 15. To reinforce this claim, Petitioner cites a variety of cases, each of which falls into three district types. In each of these cases, the defendant was charged with conspiracy or aiding and abetting, the defendant was accused of beginning the crime in one district and completing it in another, or the defendant was accused of committing a continuing criminal act.

Petitioner's reliance on these cases is misplaced. Money laundering is authoritatively shown by the brief of Respondent, at part III, not to be a continuing offense.[2] Amicus also agrees with Respondent's persuasive analysis of multi-act, multi-district crimes. Finally, Petitioner's reliance on the law of conspiracy is inapposite.

The rule that venue may be placed in a district where any conspirator acts in furtherance of the conspiracy is settled law. *Hyde v. United States*, 225 U.S. 347, 357 (1912). Arguably, venue based on vicarious responsibility stretches venue to its constitutional limit, especially in light of the *Pinkerton* rule. *Pinkerton v. United States*, 328 U.S. 640 (1946). Post-*Pinkerton*, Justice Jackson criticized such an expansive view of venue:

> An accused, under the Sixth Amendment, has the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." The leverage of a conspiracy

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[2] A potentially useful analogy not cited by either party is presented by the Court's discussion of open-ended versus close-ended patterns of racketeering activity in *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229 (1989).

> charge lifts this limitation from the prosecution and reduces its protection to a phantom, for the crime is considered so vagrant as to have been committed in any district where any one of the conspirators did any one of the acts, however innocent, intended to accomplish its object. The Government may, and often does, compel one to defend at a great distance from any place he ever did any act because some accused confederate did some trivial and by itself innocent act in the chosen district. Circumstances may even enable the prosecution to fix the place of trial in Washington, D.C. where a defendant may lawfully be put to trial before a jury partly or wholly made up of the Government that accuses him.

Krulewitch v. United States, 336 U.S. 440, 452-453 (1949) (Jackson, J., concurring).

Money laundering prosecutions are unlike conspiracy prosecutions for the reasons stated above. The crime is readily capable of being committed by one person alone through a financial transaction (section 1956) or a monetary transaction (section 1957), accompanied by proof of the requisite mens rea.[3] There are no shadowy

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[3] In *United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992), the court stated that conviction under 1956(a)(1)(B)(i) requires "proof of the defendant's knowledge of two separate facts: (1) that the funds involved in the transaction were the proceeds of illegal activity; and (2) that the transaction was designed to conceal the nature of the proceeds."

The same analysis would clearly apply to a prosecution under B(ii): the Government would need to prove that the defendant had knowledge that the funds were proceeds of illegal activity and that the transaction was designed to avoid a transaction reporting requirement.

agreements which, in many cases, the government must prove by inference from circumstantial evidence. Further, it may be that placing venue in conspiracy prosecutions anywhere a conspirator agrees or acts is a necessary response to group criminality. After all, the trial must be held somewhere, and as long as there is to be a joint trial, there is no basis for favoring one codefendant over another. However, Petitioner offers no compelling need to extend these anomalies of the venue requirement in conspiracy cases to money laundering prosecutions.

Petitioner cites *United States v. Johnson*, 323 U.S. 273 (1944) as supporting its position that a defendant may be tried in a district "despite the absence of evidence that the defendant had personally committed any criminal act, or indeed had ever been physically present in the district . . . " Brief for Petitioner at 19. A complete reading of the passage yields a different meaning:

> Aware of the unfairness and hardship to which trial in an environment alien to the accused exposes him, the Framers wrote into the Constitution that "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . " Article III, s. 2, cl. 3. As though to underscore the importance of this safeguard, it was reinforced by the provision of the Bill of Rights requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." Sixth Amendment. By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. Thus, *an illegal use of the mails or of other instruments of commerce may subject the*

> *user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district.* Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution. *Johnson* at 275. [Emphasis indicates Petitioner's quotation].

Petitioner also argues that venue is proper in Missouri because " 'the nature of the crime alleged and the location of the act or acts constituting it,' *Anderson*, 328 U.S. at 703, support the conclusion that respondent may be prosecuted for money laundering at the site of the 'specified unlawful activity.' " Brief for Petitioner at 22. This is true, Petitioner claims, because Respondent could be charged in Missouri as an aider and abettor or as a coconspirator of the underlying drug trafficking offense if she "had furnished material assistance to ongoing drug trafficking activities in the Western District of Missouri." Brief for Petitioner at 22-23. This is a very big "if." The simple fact is that the Respondent was charged with neither. As the Chief Justice of this Court has said, "[a]ll of this . . . adds up to little more than saying that if my aunt were a man, she would be my uncle." *Florida v. Royer*, 460 U.S. 491, 529 (1983). (Rehnquist, J., dissenting).

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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